No. 95-813

In The

Supreme Court of the United States

October Term, 1995

BRAD BENNETT, et al.,

Petitioners,

vs.

MARVIN PLENERT, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED

Under the citizen suit provision of the Endangered Species Act of 1973 (16 U.S.C. 1540(g)(1)) "any person" may commence a civil suit on his own behalf to enjoin the United States from violating the provisions of the Act or regulations issued thereunder. The questions presented are:

1. Whether the broad standing mandated by Congress in the citizen suit provision of the Endangered Species Act is subject to a zone of interest test as a further, judicially imposed, prudential limitation on standing;

2. If standing to sue under the Endangered Species Act is subject to prudential limitations, whether those limitations permit only environmental plaintiffs to challenge government conduct alleged to violate the terms of the Act or whether claims of economic injury raised by public water suppliers and water users are also within the zone of interests protected or regulated by the Act.

PARTIES

The petitioners are the Langell Valley Irrigation District and the Horsefly Irrigation District, each of which is organized as a political subdivision of the State of Oregon, and Brad Bennett and Mario Giordano, individuals resident in the State of Oregon.

The respondents are Marvin Plenert, the Regional Director, Region One of the United States Fish and Wildlife Service; John F. Turner, Director of the United States Fish and Wildlife Service; and Bruce Babbitt, Secretary of the United States Department of the Interior.

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OPINIONS BELOW

The decision of the United States Court of Appeals for the Ninth Circuit (App. to Pet. 1-18) is reported at 63 F.3d 915. The decision of the United States District Court (App. to Pet. 19-30) is not reported.

JURISDICTION

The decision of the United States Court of Appeals for the Ninth Circuit was filed and entered on August 24, 1995. A Suggestion for Rehearing En Banc was filed with the Ninth Circuit on October 23, 1995, and denied on November 20, 1995. The Petition for Writ of Certiorari was filed on November 21, 1995 and granted on March 25, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 11(g)(1) of the Endangered Species Act states:

> "Except as provided in paragraph (2) of this subsection any person may commence a civil suit on his own behalf –
>
> > "(A) to enjoin any person, including the United States and any other governmental instrumentality or agency (to the extent permitted by the eleventh amendment to the Constitution), who is alleged to be in violation of any provision of this chapter or regulation issued under the authority thereof."

. . .

> (C) against the Secretary where there is alleged a failure of the Secretary to perform any act or duty under section 1533 of this title which is not discretionary with the Secretary." (81 Stat. 884, 16 U.S.C. § 1540(g)(1))

Section 3(13) of the Endangered Species Act, in turn, provides:

> "The term 'person' means an individual, corporation, partnership, trust, association, or any other private entity, or any officer, employee, agent, department, or instrumentality of the Federal Government, of any State or political subdivision thereof, or of any foreign government; any State, municipality or political subdivision of a State; or any entity subject to the jurisdiction of the United States." (16 U.S.C. § 1532(13))

STATEMENT OF THE CASE

1. Nature of the Controversy

The Klamath Project was constructed by the Bureau of Reclamation ("Bureau") in the early part of this century for the purpose of providing irrigation water to reclaimed project lands. (Jt.App., p. 107) Developed along the Oregon-California border pursuant to the Reclamation Act of 1902 (generally 43 U.S.C. §§ 371 *et seq.*) the eastern portion of the project includes Clear Lake and Gerber reservoirs, constructed by the Bureau to provide a

water supply to farmers and ranchers in Southern Oregon. (App. to Pet., p. 35; Jt.App., p. 107)[1]

Throughout most of the twentieth century, the Bureau utilized long-standing procedures for storing and releasing water from the project, including Clear Lake and Gerber reservoirs, in order to produce a reliable supply of water for irrigation purposes. (App. to Pet., p. 36) *Inter alia*, a portion of this water was provided to the petitioners – two small irrigation districts organized as political subdivisions of the State of Oregon and two individual ranchers resident in Oregon – who receive their primary supply of irrigation water from the two reservoirs under federal contract. (*Id.* at pp. 33-34)

In 1988, pursuant to Section 4 of the ESA (16 U.S.C. § 1533), the United States Fish and Wildlife Service ("USFWS") listed the Lost River sucker (*Deltistes luxatus*) and shortnose sucker (*Chasmistes brevirostris*) as endangered species of fish. (53 Fed.Reg. 27130-27135) Both species are found in some reservoirs of the Klamath Project, including Clear Lake Reservoir where their population is

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[1] The Klamath project is one of the earliest federal reclamation projects. In 1905, the Oregon and California legislatures ceded title in Lower Klamath and Tule lakes to the United States for project development. (Jt.App., p. 107) Construction was authorized by the Secretary of the Interior on May 15, 1905, for project works to drain and reclaim lakebed lands of the Lower Klamath and Tule lakes to store waters of the Klamath and Lost rivers, to divert irrigation supplies, and to control flooding of the reclaimed lands. (*Id.*) Under provisions of the Reclamation Act, project costs were to be repaid through the sale of water rights to homesteaders on the reclaimed project lands. (*Id.*)

considered "sizeable." (Jt.App. p. 54) "Good numbers" of shortnose suckers are also found in Gerber Reservoir. (*Id.*)

Following the listing, the Bureau and the USFWS entered into a formal consultation pursuant to Section 7 of the ESA (16 U.S.C. § 1536) regarding the effects of long-term operation of the Klamath Project on the fish. (Jt.App., pp. 18-117) For this purpose, the Bureau proposed a long-term Klamath project operational regime which included some 20 "conservation actions" intended to protect listed species. (*Id.* pp. 21-31) None of the Bureau's proposed operational actions included any reduction in storage releases from Clear Lake or Gerber reservoirs, including reductions made for the purpose of maintaining minimum reservoir levels. (*Id.*)

As a result of the consultation regarding project operations, the USFWS, on July 22, 1992, issued a biological opinion which concluded that the long-term operation of the Klamath project proposed by the Bureau "is likely to jeopardize the continued existence of the Lost River and shortnose suckers." (App. to Pet., p. 37; Jt.App., p. 20) In view of this conclusion, the biological opinion set forth a "Reasonable and Prudent Alternative" to the Bureau's proposed long-term Project operation which, in the opinion of the USFWS "would avoid the likelihood of jeopardizing the continued existence of listed species or result in the destruction or adverse modification of critical habitat." (Jt.App., p. 86)

With respect to both Gerber and Clear Lake reservoirs, respondents' "Reasonable and Prudent Alternative" imposes restrictions on water deliveries intended to

reduce such deliveries and thereby maintain minimum reservoir elevations.[2] (App. to Pet., p. 39; Jt.App., pp. 88-92) In doing so, however, respondents' opinion never points to any scientific evidence indicating that the withdrawal of irrigation water from the two reservoirs is damaging to the "sizeable" number of fish already found therein or that maintaining a high surface water level in the reservoirs will increase their already "good numbers." Nor does the biological opinion consider the impact of reduced water deliveries upon petitioners or the communities of which they are a part. It does not, for example, consider the petitioners' need for, and reliance upon, water from Gerber and Clear Lake reservoirs. Nor does the biological opinion evaluate the impacts of

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[2] With respect to Gerber Reservoir, the Reasonable and Prudent Alternative provides:

> "Reclamation shall make no water deliveries from Gerber Reservoir when surface elevations are 4799.6 feet or less to maintain adequate water quantity and quality for summer and winter survival of shortnose suckers. Reclamation will monitor water quality on a weekly basis when this elevation is reached and provide aeration if necessary." (Jt.App., p. 90)

With respect to Clear Lake Reservoir, the Reasonable and Prudent Alternative provides, in relevant part, that the Bureau shall:

> "Operate the project to assure a minimum reservoir elevation of 4524.0 feet from February 1st to April 15th of each year to allow access to Willow Creek for spawning and dispersal of returning larval suckers, and a minimum of 4523.0 feet from April 16th to January 31st of each year to provide areas of adequate depths to reduce desiccation, predation and freezing risks." (Jt.App., p. 88)

reduced water deliveries upon petitioners and their communities in determining the reasonableness of its "Reasonable and Prudent Alternative." Finally, the opinion describes no effort whatsoever to cooperate with state and local agencies to conserve endangered species in concert with the resolution of water resource issues.

After setting forth its Reasonable and Prudent Alternative, respondents' biological opinion then includes a statement of "Incidental Take under Reasonable and Prudent Alternative." (Jt.App., pp. 92-96) In essence, the incidental take statement describes the take of species expected to occur as a result of implementation of the opinion's Reasonable and Prudent Alternative and – so long as the Bureau adheres to the conditions of the Reasonable and Prudent Alternative in its operation of the Klamath Project – gives permission for such a take to occur.[3] (*Id.*) Absent such authorization, the Bureau and its employees would remain subject to the substantial civil and criminal penalties set forth in Sections 11(a)(1) and 11(b)(1) of the ESA (16 U.S.C. § 1540(a)(1), 1540(b)(1)) if

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[3] The issuance of an incidental take statement is authorized by Section 10(a)(1)(B) of the ESA (16 U.S.C. § 1539(a)(1)(B)) which provides:

> "The Secretary may permit, under such terms and conditions as he shall prescribe –
>
> . . .
>
> (B) any taking otherwise prohibited by Section 1538(a)(1)(B) of this title [relating to the 'take' of species within the United States or its territorial sea] if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity."

operation of the Klamath Project resulted in the take of any listed, endangered species.

2. Proceedings Below

On November 12, 1992, petitioners served respondents with a 60-day written notice of violation and notice of intent to sue regarding the biological opinion for the Klamath Project.[4] (Jt.App., pp. 2-17) Incorporated into the 60-day notice and made a part thereof was petitioners' Complaint for Declaratory and Injunctive Relief, subsequently filed in the United States District Court for the District of Oregon on March 8, 1993. (App. to Pet., pp. 31-44)

By their Complaint, petitioners alleged, *inter alia*, a violation of Section 7 of the ESA (16 U.S.C. § 1536) and the Administrative Procedure Act (5 U.S.C. §§ 701 *et seq.*) resulting from respondents' imposition of restrictions on the withdrawal of irrigation water from Clear Lake and Gerber reservoirs. (App. to Pet., p. 41) These restrictions,

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[4] Petitioners' 60-day notice was filed pursuant to Section 11(g)(2)(A) of the ESA (16 U.S.C. § 1540(g)(2)(A) which provides:

> "No action may be commenced under subparagraph (1)(A) of this section [providing for civil actions to enjoin any person, including the United States, alleged to be in violation of the Act] –
>
> (i) prior to sixty days after written notice of the violation has been given to the Secretary, and to any alleged violator of any such provision or regulation."

it was alleged, adversely affect the petitioners by substantially reducing the quantity of irrigation water available to them. (*Id.* at 40) Moreover, the restrictions were imposed in the absence of any scientific evidence that the withdrawal of irrigation water from Clear Lake or Gerber reservoirs was damaging to the fish or that retaining irrigation water in the reservoirs would help them. (*Id.* at 37, 39) Thus, not only did respondents violate Section 7 by using junk science rather than the "best scientific and commercial data available"[5] but, they did so without regard to the injury caused to petitioners. (*Id.* at 38-41)

Petitioners' Complaint also alleged that respondents' imposition of water delivery restrictions to maintain minimum lake levels was an implicit determination of critical habitat for the Lost River and shortnose suckers in Clear Lake and Gerber reservoirs. (*Id.* at 42) Because that determination occurred without any consideration of the economic impact of doing so, the Complaint alleged a

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[5] Section 7(a)(2) of the ESA (16 U.S.C. § 1536(a)(2)) requires that "the best scientific and commercial data available" shall be utilized in fulfilling the consultation requirement:

> "Each federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat which is determined by the Secretary . . . to be critical, unless such agency has been granted an exemption for such action. . . . *In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available.*" (Emphasis added)

violation by respondents of Section 4(b)(2) of the ESA (16 U.S.C. § 1533(b)(2))[6] and the provisions of the Administrative Procedure Act. (App. to Pet., p. 42) Based upon their claims, petitioners requested the trial court to compel respondents to withdraw their biological opinion and to declare respondents' actions to be in violation of both Sections 4 and 7 of the ESA. (*Id.* at 43-44)

Respondents moved to dismiss the complaint on the ground that petitioners lacked standing. (*Id.* at 20) In an unpublished order issued November 18, 1993, the District Court agreed that petitioners lacked prudential standing to sue under the ESA. (*Id.*)

On appeal, the Ninth Circuit upheld the District Court and rejected the contention that the citizen suit language of Section 11(g) of the ESA abrogates prudential barriers to standing. (App. to Pet., p. 11) Finding that such a contention, if accepted, would permit plaintiffs to sue even though their

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[6] Section 4(b)(2) of the Endangered Species Act provides:

> "The Secretary shall designate critical habitat, and make revisions thereto, under subsection (a)(3) of this section on the basis of the best scientific data available and after taking into consideration the economic impact, and any other relevant impact, of specifying any particular area as critical habitat. The Secretary may exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in extinction of the species concerned." (16 U.S.C. § 1533(b)(2))

purposes were "plainly inconsistent with, or only 'marginally related' to, those of the Act . . . " the Ninth Circuit held that "only plaintiffs who allege an interest in the *preservation* of endangered species fall within the zone of interest protected by the ESA." (*Id.*)

Finding the purposes of the ESA to be singularly aimed at species preservation, the Ninth Circuit also concluded that potential plaintiffs with economic or recreational claims *could not* satisfy the requisites of prudential standing. (*Id.* at 12-13) Indeed, the fact that petitioners sought to raise a competing interest in water from the affected reservoirs was enough, in the Ninth Circuit's view, to deprive them of standing to challenge the Government's determination of the amount of water necessary for the two protected species. (*Id.* at 16) Moreover, the fact that Congress had specifically directed the Government to consider economic factors in making the kinds of determinations challenged by the petitioners did not cause the Ninth Circuit to alter its views on standing. According to the Court, Congress did not, by including such factors "intend impliedly to confer standing on every plaintiff who could conceivably claim that the failure to consider one of those factors adversely affected him." (*Id.* at 17)

Thus, on August 24, 1995, the Ninth Circuit affirmed the Judgment of the District Court. Following the denial of their Suggestion for Rehearing En Banc (treated by the Ninth Circuit as a Petition for Rehearing) (See App. to Res. Reply to Pet., p. 1(a)) petitioners filed a Petition for Writ of Certiorari, which was granted on March 25, 1996.

SUMMARY OF ARGUMENT

1. The Ninth Circuit Court of Appeals erred in holding that a zone of interest test applies to claims brought pursuant to the citizen suit provision of the Endangered Species Act. Even if the petitioners would otherwise be barred by the rules of prudential standing, the decisions of this Court recognize that Congress may expand standing to the full extent permitted by Article III of the Constitution. By authorizing "any person" to commence a civil action to enjoin the United States from violating the ESA, Congress did just that – it acted to abrogate any prudential limitations that might otherwise apply to citizen suits brought under the Act. The irreducible, core components of Article III standing nevertheless remain to ensure that real "cases" or "controversies" will be brought to the courts.

2. Even if it is concluded that a zone of interest test applies to cases brought pursuant to the citizen suit provision of the ESA, the Ninth Circuit erred in barring all potential plaintiffs under the ESA except those "who allege an interest in the preservation of endangered species." Since its inception in *Association of Data Processing Service Organizations v. Camp*, 397 U.S. 150 (1970) and *Barlow v. Collins*, 397 U.S. 159 (1970), the prudential standing test has been characterized as requiring an evaluation of whether the interest sought to be protected by the complaint is arguably within the zone of interest to be protected *or regulated* by the statute in question. Regardless of whether the interests sought to be protected by petitioners are within the zone of interest *protected* by the

ESA, they are certainly within the zone of interest *regulated* by the Act and thus satisfy the prudential enquiry – assuming that it applies.

3. Should it be concluded, however, that the only relevant consideration for purposes of prudential standing is the zone of interest *protected* by the statute in question, the Ninth Circuit again erred in reading the ESA as a single-purpose statute whose protective net is so narrow that it excludes everyone except those asserting an interest in the preservation of endangered species. Through a series of amendments, Congress has acted to broaden the range of interests cognizable under the ESA to encompass the claims raised by the petitioners in the present case:

> **(a)** In 1978, Congress amended Section 4 of the ESA to add language obligating the Secretary of the Interior to weigh and balance the economic impact of specifying any particular area as critical habitat. (ESA, Section 4(b)(2); 16 U.S.C. § 1533(b)(2)) The legislative history indicates the amendment was made for the purpose of broadening the focus of the ESA to accommodate economic-based interests. Precisely such interests were raised by the petitioners' complaint which alleges a determination of critical habitat without *any* consideration of economic impacts.
>
> **(b)** In 1979, Congress amended Section 7 of the ESA to add language obligating the Secretary of the Interior to base biological opinions on the "best scientific and commercial data available." The legislative history and subsequent case law show that the amendatory language was designed to require the Secretary to develop biological opinions based upon credible evidence, not conjecture. Potential plaintiffs in the regulated community, such as the petitioners, have a strong interest in assuring that biological opinions are based on the best evidence available. Under the Ninth Circuit's holding, however, such plaintiffs are barred from presenting claims that biological opinions are based on speculation rather than science.
>
> **(c)** In 1978, Congress also amended Section 7 of the ESA to require that any alternatives suggested by the USFWS in a biological opinion be "reasonable" as well as "prudent." (ESA, Section 7(b)(3)(A); 16 U.S.C. § 1536(b)(3)(A))[7] Reference to the legislative history of the Act shows that this choice of wording was deliberate and was intended to ensure that "community impacts," "economic feasibility" and "other relevant factors" are taken into account when biological opinions are developed. Realistically, the

[7] Section 7(b)(3)(A) of the Endangered Species Act provides:

> "Promptly after conclusion of consultation under paragraph (2) or (3) of subsection (a) of this section, the Secretary shall provide to the Federal agency and the applicant, if any, a written statement setting forth the Secretary's opinion, and a summary of the information on which the opinion is based, detailing how the agency action affects the species or its critical habitat. If jeopardy or adverse modification is found, the Secretary shall suggest those *reasonable and prudent alternatives* which he believes would not violate subsection (a)(2) of this section and can be taken by the Federal agency or applicant in implementing the agency action." (16 U.S.C. § 1536(b)(3)(A)) (emphasis added)

only persons with an interest in seeing that the reasonableness obligation imposed by Congress is carried out are those, like petitioners, who assert an economic interest in the activity which is the subject of the biological opinion.

(d) Congress also amended the ESA in 1982 to add a declaration of policy that federal agencies "shall" cooperate with state and local agencies to resolve water resource issues "in concert" with the conservation of endangered species. (ESA, Section 2(c)(2); 16 U.S.C. § 1531(c)(2))[8] With respect to the matter of "water resource issues," Congress thus granted state and local water resource agencies an interest in obtaining federal cooperation in resolving endangered species conservation issues agreeably with water resource management concerns. Such agencies include petitioners Langell Valley Irrigation District and Horsefly Irrigation District,[9] each of which has an interest protectable under the express terms of Section 2(c)(2) of the ESA itself.

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[8] Section 2(c)(2) of the ESA (16 U.S.C. § 1531(c)(2)) provides:

> "It is further declared to be the policy of Congress that federal agencies shall cooperate with state and local agencies to resolve water resource issues in concert with conservation of endangered species."

[9] Petitioners Horsefly Irrigation District and Langell Valley Irrigation District are each alleged to be a political subdivision of the State of Oregon. (App. to Pet., p. 34)

4. Although the Ninth Circuit found that Article III standing was not the issue presented by this litigation,[10] respondents have nonetheless attempted to raise constitutional standing claims outside the scope of the issues presented by the Petition for Writ of Certiorari. (Br. for Res. in Opp. to Pet., pp. 9-11) Anticipating that this effort may continue as the case moves forward, the petitioners believe it is appropriate for the Court to consider the following:

(a) First, with respect to Article III standing, it is significant that this case was decided at the trial court level by way of a motion to dismiss. (App. to Pet., p. 28) At the pleading stage, unlike the summary judgment stage or at trial, the burden of establishing constitutional standing is a modest one. Here, that burden was more than adequately met by petitioners' complaint. Not only have petitioners alleged a specific injury-in-fact based upon reduced irrigation water deliveries to themselves, but they assert far more than a generally available grievance since the rights they claim have been infringed are based upon contracts held with the federal government.

(b) In addition, respondents' argument that Article III causation and redressability are lacking since a biological opinion can be readily ignored by agencies such as the Bureau, is

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[10] According to the Ninth Circuit:

> "The issue before us is not whether the plaintiffs have satisfied the constitutional standing requirements but whether their action is precluded by the zone of interests test, the prudential standing limitation." (63 F.3d 915, 917)

incompatible with the structure of the ESA itself. Not only is the Bureau's discretion circumscribed by regulations which prevent biological opinions from being ignored, it is subject, ultimately, to the risk that the standards of the ESA will not have been met. Considering that the protection afforded by an incidental take statement – such as the take statement incorporated by the USFWS in its biological opinion for the Klamath Project – exists only if there is compliance with the recommended Reasonable and Prudent Alternative, deviation from the biological opinion is not a matter of bureaucratic whim. The civil and criminal penalties for unauthorized take of a listed species are substantial and apply to the Bureau and its employees just as they do to other "persons." In short, there is no basis for assuming – as respondents do – that a change in the biological opinion issued for the Klamath Project will not result in a change in the Bureau's operation of the Project.

5. Finally, respondents' additional contention that a "flawed" biological opinion is unreviewable under the ESA and that overregulation is not actionable so long as it is done in the name of species preservation (Br. for Res. in Opp. to Pet., pp. 11-13), is wholly lacking in merit. If a biological opinion is flawed because it was developed in violation of one or more provisions of the ESA, it is enjoinable under Section 11(g)(1). The related notion that ESA overregulation is exempt from challenge so long as it is done for virtuous reasons is not only incompatible with prior decisions of this Court that establish a presumption of reviewability, it is also incompatible with the rule of

law. Like everyone else, the USFWS is required to operate within the confines of the ESA.

ARGUMENT

I. BY DRAFTING THE CITIZEN SUIT PROVISION OF THE ENDANGERED SPECIES ACT BROADLY TO ENCOMPASS "ANY PERSON," CONGRESS EXPANDED STANDING TO THE FULL EXTENT PERMITTED BY ARTICLE III OF THE CONSTITUTION

The decisions of this Court recognize that while standing includes a "core component" which consists of certain "irreducible constitutional minimum" elements that must be met by any plaintiff,[11] it also incorporates certain prudential considerations that may be removed by congressional grant of an express right of action. (*Gollust v. Mendell*, 501 U.S. 115, 126 (1991); *Havens Realty Corp. v.*

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[11] As explained in *Lujan*, *supra*, the constitutional minima consist of the following:

> "First, the plaintiff must have suffered an 'injury in fact' – an invasion of a legally-protected interest which is (a) concrete and particularized and (b) 'actual or imminent, not "conjectural" or "hypothetical." ' Second, there must be a causal connection between the injury and the conduct complained of – the injury has to be 'fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court.' Third, it must be 'likely' as opposed to merely 'speculative' that the injury will be 'redressed by a favorable decision.' " (504 U.S. ___; 119 L.Ed.2d 351, 364) (citations omitted)

Coleman, 455 U.S. 363, 372 (1982); *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 100 (1976); *Warth v. Seldin*, 422 U.S. 490, 501 (1975))

In the companion cases of *Association of Data Processing Service Organizations v. Camp*, 397 U.S. at 153 and *Barlow v. Collins*, 397 U.S. at 164, the Court characterized the prudential considerations of the standing doctrine in terms of a "zone of interest." Writing for the Court in both of these frequently criticized cases,[12] Justice Douglas cast the zone of interest test as a rule of judicial self-restraint, not as a rule having constitutional dimension. (*Barlow* at 154) Moreover, he recognized that Congress could, if it so elected, resolve the question of a zone of interest by expanding the limits of standing to the boundaries imposed only by Article III of the Constitution. (*Data Processing* at 153-154)

Nearly a decade later, the Court elaborated upon its statement that Congress could, by legislation, "resolve the question" of prudential standing. In *Gladstone Realtors v. Village of Bellwood, supra*, the Court considered language in the Fair Housing Act of 1968 (42 U.S.C. §§ 3601 *et seq.*) which authorized any "person aggrieved" to commence a civil action to enforce the rights granted by the

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[12] With respect to the "injury-in-fact" concept developed in the cases, one commentator states, "More damage to the intellectual structure of the law of standing can be traced to *Data Processing* than to any other single decision." (Fletcher, *The Structure of Standing*, 98 Yale L.J. 221, 229 (1988)). Another has characterized *Data Processing* as "a remarkably sloppy opinion." (Sunstein, *What's Standing After Lujan? of Citizen Suits, 'Injuries' and Article III,"* 91 Mich. L.R. 163, 185 (1992)). While a third considers it an "unredeemed disaster." (Stewart, *Standing for Solidarity*, 88 Yale L.J. 1559, 1569 (1979) (book review)).

Act. Concluding that Congress had intended to grant standing "as broad as is permitted by Article III of the Constitution" (441 U.S. at 109 (quoting *Trafficante v. Met. Life Ins. Co.*, 409 U.S. 205 at 209 (1972)) the Court recognized that Congress could, by legislation, "expand standing to the full extent permitted by Article III, thus permitting litigation by one 'who otherwise would be barred by prudential standing rules.' " (441 U.S. at 100) (citations omitted)

In the citizen suit provision of the Endangered Species Act, Congress chose authorizing language even broader than that interpreted by the court in *Gladstone Realtors*. Indeed, by authorizing "any person" to enjoin "any person" (including the United States and any other governmental instrumentality or agency) alleged to be in violation of "any provision" of the Act (§ 11(g)(1)(A)) or to commence suit against the Secretary of the Interior for failure to perform a non-discretionary duty under the Act (§ 11(g)(1)(C)), Congress used the broadest language possible. To confirm its intent to provide access to the courts in a wide range of circumstances, Congress defined the term "person" inclusively:

> "The term 'person' means an individual, corporation, partnership, trust, association, or any other private entity, or any officer, employee, agent, department, or instrumentality of the Federal Government, of any State or political subdivision thereof, or of any foreign government; any State, municipality, or political subdivision of a State; or any other entity subject to the jurisdiction of the United States." (ESA § 3(13); 16 U.S.C. § 1532(13))

When they are applied to this case, the foregoing provisions indicate that Congress expressly authorized suit by "individual(s)" and "political subdivision(s) of a State" against "the Secretary" for violating a non-discretionary duty or against "any officer, employee, agent, department, or instrumentality of the Federal Government" for violating "any provision" of the Act. (ESA §§ 3(13), 11(g)(1)(A), (C); 16 U.S.C. §§ 1532(13), 1540(g)(1)(A), (C)) Congress further provided that the district courts "shall" have jurisdiction over such suits (§ 11(g)(1); 16 U.S.C. § 1540(g)(1)) and that venue is appropriate in any judicial district in which the violation occurs. (ESA § 11(g)(3)(A); 16 U.S.C. § 1540(g)(3)(A)) In short, by defining the permissible plaintiffs, the permissible defendants and the permissible claims as broadly as possible, and by providing explicitly for district court jurisdiction and venue, Congress acted to abrogate any "zone of interest" requirement that might otherwise apply.

Congress' purpose in this regard is confirmed by the legislative history of the Endangered Species Act of 1973. Commenting upon H.R. 37, which contained the citizen suit language eventually enacted into law, the House Committee on Merchant Marine and Fisheries described the intended purpose of the citizen suit language in the following terms:

> "This subsection authorizes citizen action to enforce the provisions of the Act. It allows any person, including a Federal official, to seek remedies involving injunctive relief for violations or potential violations of the Act. *The language is parallel to that contained in the recent*

> *Marine Protection, Research and Sanctuaries Act of 1972, and is to be interpreted in the same fashion.*" (H.Rep. No. 93-412, pp. 18-19 (1973)) (emphasis added)

The Committee's reference to the Marine Protection, Research and Sanctuaries Act ("MPRSA") (33 U.S.C. §§ 1401 *et seq.*) is instructive. In *Middlesex City Sewerage Auth. v. Nat. Sea Clammers* 453 U.S. 1 (1981) the Court read the citizen suit provision of the MPRSA similarly to the citizen suit provision of the Federal Water Pollution Control Act. In doing so, the Court held that Congress' purpose was to 'allow suits by all persons possessing standing under this Court's decision in *Sierra Club v. Morton* 405 U.S. 727 (1972)" (453 U.S. 1, 17) – a group which the Court defined broadly to include "persons like respondents who assert that they have suffered tangible economic injuries because of statutory violations." (*Id.*) Since the Court's opinion in *Sierra Club v. Morton* defined the constitutional requirement for "injury-in-fact" as set forth in Article III of the Constitution (405 U.S. 727, 739-746), and made no mention of any "zone of interest," it is reasonable to assume that Congress intended to expand standing to the limits of Article III where it enacted the citizen suit provision of the ESA.

Importantly, however, Congress did not attempt, through the ESA's citizen suit language, to open the courthouse doors so widely that *anyone* can file suit in federal court to challenge the failure of federal agencies to comply with the law. (See *Lujan v. Defenders of Wildlife*, 504 U.S. ___; 119 L.Ed.2d at 371) While Congress could, perhaps, have added language to the citizen suit provisions of the ESA "to define injuries and articulate chains

of causation" that meet the requirements of Article III (*id.*; 504 U.S. ___; 119 L.Ed.2d at 377) (Kennedy, J., concurring) it did not do so. Accordingly, while no zone of interest test exists to bar suits under the ESA on prudential grounds; as recognized in *Gladstone, supra*, any potential plaintiff under the ESA must satisfy the requirements of Article III. As explained *infra*, the petitioners in the present case amply meet these requirements.

In *Defenders of Wildlife v. Hodel*, 851 F.2d 1035 (8th Cir. 1988), *opinion after remand*, 911 F.2d 117 (1990), *rev'd on other grounds sub.nom., Lujan v. Defenders of Wildlife*, 504 U.S. ___, 119 L.Ed.2d 351, the Eighth Circuit relied upon *Gladstone Realtors* when it considered whether prudential limitations apply to citizen suits commenced under the ESA. It concluded that Congress' use of the term "any person" abrogated such limitations. (851 F.2d 1035, 1039)[13]

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[13] Faced with similarly broad statutory authorizations for suit, a variety of lower courts have found a congressional intent to abrogate prudential standing limitations. These cases include *Swan View Coalition v. Turner*, 824 F.Supp. 923, 929 (D. Mont. 1992) (prudential standing limitations do not apply to the Endangered Species Act; thus, a plaintiff suing under the citizen suit provision "need only meet the constitutional requirements for standing in order to bring their claim under the ESA"); *Family and Children's Center v. School City*, 13 F.3d 1052, 1061 (7th Cir.), *cert. denied*, 115 S.Ct. 420 (1994) [Individuals with Disabilities Education Act ("IDEA")] provision authorizing suits by "any person aggrieved" meant that litigants "need not run the gauntlet of prudential standing tests; satisfying Art. III is enough"); *Competitive Enterprise Institute v. National Highway Traffic Safety Administration*, 901 F.2d 107, 118-19 (D.C. Cir. 1990) (Energy Policy and Conservation Act ("EPCA") provision authorizing suit by "any person who may be adversely affected by any rule" eliminated prudential standing limitations); *Consumers Union v. Federal Trade Commission*, 691 F.2d 575, 576 (D.C. Cir. 1982) (en banc), *aff'd* 463 U.S. 1216 (1983) (Federal Trade Commission Improvement Act provision authorizing "any interested party" to challenge the congressional veto provisions of the Act was "intended to permit standing . . . to the full extent permitted by Article III.")

When this Court reviewed the Eighth Circuit's decision, it reversed the conclusion that the plaintiffs met the standing requirements imposed by Article III. (*Lujan v. Defenders of Wildlife, supra*, 504 U.S. ___; 119 L.Ed.2d 351, 365-75) At the same time, however, the Court left intact the circuit court's conclusion regarding congressional abrogation of prudential standing by means of Section 11(g) of the ESA. Indeed, when the Court discussed prudential standing at all, it did so in terms which emphasized judicial self-government rather than the concept of a barrier to otherwise qualified plaintiffs:

> "One of those landmarks, setting apart the 'cases' and controversies that are of the justiciable sort referred to in Article III – 'serving to identify those disputes which are appropriately resolved through the judicial process' – is the doctrine of standing. *Though some of its elements express merely prudential considerations that are part of judicial self-government*, the core component of standing is an essential and unchanging part of the case – or – controversy requirement of Article III." (504 U.S. ___ 119 L.Ed.2d at 364) (citations omitted)

The Ninth Circuit's decision in the present case is contrary to the plain language of Section 11(g) of the ESA and effectively ignores the consistently expressed view of

this Court that Congress may expand standing under a statute to the limits of Article III of the Constitution. Although it cites *Gladstone Realtors* to that effect (App. to Pet., p. 8) it never applies *Gladstone* – or *Data Processing* or any other decision of the Court – to the citizen suit language actually adopted by Congress in the ESA. Likewise, although the Ninth Circuit acknowledges a conflict between its decision and the Eighth Circuit's decision in *Defenders of Wildlife, supra,* (App. to Pet., p. 8, n. 3) it never offers to explain why, in its view, the Eighth Circuit's decision is incorrect.[14]

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[14] The Ninth Circuit's decision did point out that the split of authority among the circuit courts of appeal includes the Circuit Court of Appeals for the District of Columbia (App. to Pet. p. 8) which has stated in dicta, in three cases, that Congress' decision to incorporate citizen suit language into the ESA did not abrogate the obligation of a plaintiff to demonstrate prudential standing. (See *State of Idaho By and Thru Idaho Public Utilities Commission v. ICC*, 35 F.3d 585, 592 (D.C. Cir. 1994); *Humane Soc. of the U.S. v. Hodel*, 840 F.2d 45 (D.C. Cir. 1988); *National Audubon Society v. Hester*, 801 F.2d 405, 407 (D.C. Cir. 1986)

It is noteworthy, however, that none of the D.C. Circuit's opinions on the issue – unlike the Eighth Circuit's opinion in *Defender's of Wildlife, supra,* – was the subject of a hearing by this Court. Nor has the D.C. Circuit attempted to use prudential standing to bar everyone except environmental plaintiffs from suit under the ESA. To the contrary if it has found, for example, that a state's proprietary interest in land satisfies the test without regard to whether the state has an interest in the preservation of endangered species. (*State of Idaho, supra; see also, Catron County Board of Commissioners v. United States Fish and Wildlife Service*, ___ F.3d ___, 1996 U.S. App. Lexis 1479 (10th Cir. 1996)) Indeed, the D.C. Circuit appears to have never applied prudential standing to exclude *any* class of plaintiffs from an ESA suit, let alone all classes of potential plaintiffs, save one.

Less than two months prior to issuance of the appellate opinion herein, *this Court* reached the merits of the controversy in *Babbitt v. Sweet Home Chapter of Communities*, 515 U.S. ___, 132 L.Ed.2d 597 (1995). In *Sweet Home*, "small landowners, logging companies and families dependent upon the forest products industries" asserted *economic interests*, not an interest in the prevention of endangered species when they challenged a regulation issued by the Secretary of the Interior to define the word "harm" used in the ESA. (515 U.S. at ___; 132 L.Ed.2d at 608) If the highly exclusionary "zone of interest" defined by the Ninth Circuit in fact exists, then this Court could never have reached the merits of the *Sweet Home* controversy.

II. EVEN IF A ZONE TEST APPLIES, PETITIONERS ARE WELL WITHIN THE ZONE OF INTERESTS REGULATED BY THE ENDANGERED SPECIES ACT

When this Court articulated a zone of interests test in *Data Processing*, it did so in terms that recognized not only a zone of interest "protected" by the statute in question, but also a zone of interest "regulated" by the relevant statute:

> "The question of standing is different. It concerns, apart from the 'case' or 'controversy' test, the question whether the interest sought to be protected by the complaint is arguably within the zone of interest to be protected *or regulated* by the statute or constitutional guarantee in question." (397 U.S. at 153) (emphasis added)

By focusing exclusively on the purported zone of interest "protected" by the ESA and ignoring any zone of interest *regulated* under the ESA, the Ninth Circuit managed to truncate the prudential standing test in a manner incompatible with the very decision which established the test. Because they receive their primary source of irrigation water from the federal reservoirs that are regulated by the biological opinion adopted by respondents, the petitioners are without doubt, "arguably within the zone of interest . . . regulated by the statute . . . in question."

Nearly two decades after it launched the zone of interest concept, the Court used its decision in *Clarke v. Securities Industry Association*, 479 U.S. 388 (1987) to further explain how the concept should be applied. In doing so, the Court advanced an expansive view of prudential standing greatly at odds with the cramped, grudging zone of protection concept offered by the Ninth Circuit. According to *Clarke*, the "essential inquiry" is whether Congress intended for a particular class of plaintiffs to be relied upon to challenge agency disregard of the law. (*Id.* at 399) Thus, the zone of interest test acts as a "guide" in Administrative Procedure Act cases for determining whether a plaintiff should be heard and is "not meant to be especially demanding." (*Id.* at 399-400) Only if the plaintiffs' interests are "so marginally related to or inconsistent with the purposes implicit in the statute" will the suit be rejected on prudential grounds. (*Id.*)[15]

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[15] One commentator – who has since been nominated to the Ninth Circuit – has provided the following interpretation of *Clarke*:

> "*Clarke* provides a welcome transformation of *Data Processing's* 'arguably within the zone of interest' test. Under *Data Processing*, standing was a question of whether plaintiff was 'arguably' entitled to sue rather than whether plaintiff was actually entitled to do so. In *Clarke*, the 'arguably' language *becomes a presumption in favor of standing* in APA cases rather than a signal that the standing determination is only a preliminary and tentative decision about whether plaintiff is actually entitled to sue. . . . " (Fletcher, *The Structure of Standing*, *supra*, 98 Yale L.J. 221, 264) (citations omitted) (emphasis added)

Although the Ninth Circuit believes that *Clarke* "resuscitated" the zone of interest test,[16] it never followed this Court's view that the "essential inquiry" is whether Congress intended for a particular class of plaintiffs to be relied upon to challenge agency disregard of the law. Nor did it give any apparent consideration to *Clarke's* view that a zone of interest test is "not meant to be especially demanding."

When it drafted a citizen suit provision allowing "any person" to challenge government conduct alleged to violate the ESA, Congress logically could expect that those within the zone of interest regulated by the Act could be relied upon to challenge certain types of agency disregard of the law. Indeed, if that disregard concerns

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[16] The Ninth Circuit's view of *Clarke* is a matter of considerable debate. As already noted, one commentator has expressed the view that *Clarke* provided a "transformation" of the zone of interest test to a "presumption in favor of standing in APA cases." (Fletcher, *supra*). Another has expressed the view that, "This opinion [*Clarke*] puts the zone of interest test once again into eclipse." (Wright, Miller & Cooper *Federal Practice and Procedure*: Jurisdiction 2d § 3531.7 (1995 Supplement))

over-regulation undertaken without considering the economic balancing obligations imposed by the Act, the *only* potential plaintiffs who could be relied upon to challenge the agency are those within the zone of interest *regulated* by the Act.[17] Here, petitioners' contractual-based reliance upon Clear Lake and Gerber reservoirs places them well within that zone.[18]

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[17] Certainly, the environmental plaintiffs favored by the Ninth Circuit are unlikely to have an interest in raising such a challenge; nor is it realistic to believe – as the Ninth Circuit apparently does (63 F.3d 915, 917, n. 2) – that such a challenge could be raised by a *regulated* federal agency against a federal *regulating* agency. Indeed, since the conduct of litigation in which the United States is a party is reserved to the Department of Justice (28 U.S.C. § 516) which presumably speaks with one voice, it is doubtful that such litigation could be mounted at all. Further, it is unclear to petitioners how potentially collusive litigation brought by sister agencies answerable to the same cabinet official furthers the goal of the standing doctrine in identifying those justiciable "cases" or "controversies" which are "appropriately resolved through the judicial process. . . ." (*Lujan v. Defenders of Wildlife, supra* 504 U.S. ___; 119 L.Ed.2d 351, 364) As has been true for a considerable period of time, in the Ninth Circuit and elsewhere, those who rely on federal projects – not the federal operator of the project – are more likely to present a real "case" or "controversy" regarding federal regulatory action.

[18] The decisions of this Court strongly suggest that standing will be found to exist if government regulation affects the plaintiff's *contractual relationship* with a regulated party. For example, in *United States v. Storer Broadcasting Co.* 351 U.S. 192 (1956) the Court quoted approvingly from its decision in *Columbia Broadcasting System v. United States*, 316 U.S. 407 (1941):

> "Appellant's standing to maintain the present suit in equity is unaffected by the fact that the *regulations are not directed to appellant* and do not in terms compel

In short, petitioners are within the zone of interest regulated by the ESA. Moreover, they are logically the only potential plaintiffs with an interest sufficient to see that the economic balancing requirements added to the ESA by Congress are enforced.[19] Accordingly, whether it

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> action by it or impose a penalty upon it. . . . It is enough that, by setting controlling standards for the Commission's action, *the regulations purport to operate to alter and affect adversely appellant's contractual rights and business relations* with station owners whose applications for licenses the regulations will cause to be rejected and whose licenses the regulations may cause to be revoked." (351 U.S. 192, 199) (emphasis added) (citations omitted)

Similarly, in *Cotovsky-Caplan Physical Therapy Assn. v. United States*, 507 F.2d 1363 (7th Cir. 1975), the Court per Judge (now Justice) Stevens upheld the standing of a plaintiff to challenge an HEW medicare regulation even though the regulation did not directly regulate the plaintiff. The regulation did, nonetheless, affect the plaintiff's *contractual relations* with regulated parties:

> "We therefore conclude that if, pursuant to what it perceives to be its statutory authority, a government agency regulates the *contractual relationships* between a *regulated* party and an *unregulated* party, the *latter* as well as the former may have interests that are arguably within the regulated zone for purposes of testing standing." (507 F.2d 1363 at 1367) (emphasis added)

[19] According to the Ninth Circuit, the petitioners effectively have a "competing interest" – with the fish – in the water stored in Clear Lake and Gerber reservoirs. (63 F.3d at 921) The decisions of this Court consistently recognize that the existence of such a competitive interest is sufficient to support standing, even if a zone of interests tests is applicable. (*Association of Data Processing Service Organizations v. Camp*, 397 U.S. 150, 157; *Arnold Tours, Inc. v. Camp*, 400 U.S. 45, 46 (1970); *Investment*

is the "zone of interest" analysis of *Data Processing* or the "essential inquiry" analysis of *Clarke* which is used, petitioners satisfy the requirements of prudential standing to challenge the biological opinion issued in this case.

III. THE RANGE OF INTERESTS PROTECTED BY THE ENDANGERED SPECIES ACT ENCOMPASSES THE INTERESTS ASSERTED BY PETITIONERS

Even if the focus of the zone of interest analysis is narrowed to an examination of the interests *protected* by the ESA, the allegations raised by petitioners are embraced by at least four different amendments adopted by Congress for the purpose of injecting economic rationality into the Act. Each of these provisions is directly related to the claims raised by the petitioners in this proceeding.

(a) Congress Explicitly Required a Balancing of Impacts as Part of the Designation of Critical Habitat

In 1978, Congress amended Section 4 of the ESA (16 U.S.C. § 1533) to require the Secretary to consider "the economic impact, and any other relevant impact" of specifying "any particular area" when he designates critical

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Company Institute v. Camp, 400 U.S. 617, 620 (1971); *Clarke v. Securities Industry Assn.*, *supra*, 479 U.S. 388, 403; *see also, FCC v. Sanders*, 309 U.S. 470, 476-477 (1940))

habitat.[20] According to the House Report which accompanied the bill that added the balancing language (H.R. 14104, 95th Cong., 2nd Sess. (1978)) the proposal represented a compromise between disparate points of view: it attempted to retain the basic integrity of the ESA while introducing some flexibility that would permit exemptions from the Act's requirements. (H.R. Rep. No. 1625, 95th Cong., 2nd Sess., (1978), *reprinted in* 1978 U.S.C.C.A.N. 9453, 9463-64)).

During the debates in the House leading to adoption of H.R. 14104, Representative Leggett, the bill's author, described the purpose of the balancing requirement. He stated:

> "The Endangered Species Act has been criticized because it allows for no consideration of the economic impact of listing a species or designating critical habitat. Although H.R. 14104 retains the Act's stringent mandate, it does introduce a consideration of economic impact in

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[20] The language adopted by Congress in 1978 added the following paragraph to Section 4(b) of the ESA:

> "In determining the critical habitat of any endangered or threatened species, the Secretary shall consider the economic impact, and any other relevant impacts, of specifying any particular area as critical habitat, and he may exclude any such area from the critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying the area as part of the critical habitat, unless he determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species. (Act of Nov. 10, 1978, Pub. L. No. 95-632, 1978 U.S.C.C.A.N. (92 Stat.) 366).

> several respects. . . . [T]he bill includes a provision which requires the Secretary to evaluate the economic impact of designating critical habitat for invertebrate species. This provision authorizes the Secretary to alter the designation of critical habitat for the species if he determines that the benefits associated with excluding the habitat outweigh the benefits associated with the designation. . . . " (124 Cong. Rec. 38,134 (1978) (Statement of Rep. Leggett)).

In 1982 when Congress later reauthorized and amended the ESA (P.L. 97-304) the House Report which accompanied the amendments stated the following regarding the balancing obligation in Section 4:

> "Desirous to restrict the Secretary's decision on species listing to biology alone, the [Merchant Marine and Fisheries] Committee nonetheless recognized that the critical habitat designation, with its attendant economic analysis, offers some counter-point to the listing of species without due consideration for the effects on land use and other development interests." (H.R. 567, 97th Cong., 2nd Sess. (1982), *reprinted in* 1982 U.S.C.C.A.N. 2807, 2812 (Merchant Marine and Fisheries Committee))

Congress thus amended the ESA for the explicit purpose of broadening its focus to accommodate economic-based interests in connection with the determination of critical habitat. Precisely such interests were raised in the complaint filed by petitioners herein. With considerable clarity they alleged a determination by the Secretary of critical habitat without *any* consideration of economic impacts, in violation of the ESA. (App. to Pet., p. 42)

The Ninth Circuit's refusal to find standing in these circumstances is inconsistent with the statements of both the author of the bill which added the economic balancing requirement to the ESA and the House Committee with jurisdiction over the Act. Of equal concern, the Ninth Circuit's decision denies standing to the only potential plaintiffs possessing a substantial interest in assuring that the habitat designation process is rational in its consideration of economic factors.

(b) Congress Amended the ESA To Require That Biological Opinions Be Based Upon Scientific and Commercial Data, Not Speculation

In 1979, Congress amended Section 7 of the ESA to require the Secretary of the Interior to prepare biological opinions based on the "best scientific and commercial data available."[21] A review of the biological opinion at issue in this case shows that petitioners belong to the

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[21] As amended, Section 7(a)(2) reads in relevant part:

> Each federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary . . . to be critical, unless such agency has been granted an exemption for such action . . . *In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available.* (Emphasis added)

class of persons Congress intended to benefit when it required the Secretary to do so.

Here, the biological opinion includes a "Reasonable and Prudent Alternative" to the long-standing operating procedures of Clear Lake and Gerber reservoirs, even though the USFWS concluded that the populations of the fish in the two reservoirs were either "sizeable" or existing in "good numbers." (Jt.App. p. 54) It imposes surface level restrictions at both reservoirs without pointing to scientific or commercial data indicating that previously existing reservoir operating procedures were incompatible with the well-being of the fish *or* that the reservoir level restrictions made a part of the opinion's Reasonable and Prudent Alternative would improve their condition. (Jt.App. pp. 88-92) In short, the biological opinion is based on speculation, not science, because it simply assumes without *any* supporting scientific or commercial data, that reservoir restrictions are necessary to protect fish populations already found to be doing just fine.[22]

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[22] Very recently, in the case *Mausolf v. Babbitt*, 913 F. Supp. 1334, (D. Minn. 1996), the United States District Court overturned another biological opinion issued by the USFWS on similar grounds:

> "The Court finds that the agency's conclusion that these lakeshore closures are reasonably necessary to prevent incidental takings of Voyageurs wolves and bald eagles is based on little more than speculation. In the end, the FWS and the NPS (National Park Service) simply contend that temporary displacements of these species may evolve into permanent displacements if snowmobilers are allowed continued access to the lakeshore trails. There is absolutely no evidence in the record to support this proposition. Indeed, the only record evidence is to the contrary . . . " (913 F.Supp. 1334, 1344)

This is precisely the type of violation of the ESA Congress intended to subject to judicial review.[23]

Petitioners brought themselves squarely within the zone of interests protected by Section 7(a) of the Act when they claimed that the Secretary did not impose minimum reservoir level restrictions based on the best scientific and commercial data available. (App. to Pet. pp. 38-39) It is the kind of claim which persons having an economic interest in the reservoir's water would be most likely to raise. Under the Ninth Circuit's holding, however, this is the type of claim that, in future, will not be heard on the merits.

The conference report of the 1979 amendments which imposed the obligation to use the "best scientific and commercial data" on the Secretary explained that the

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[23] Indeed, in *Pacific Legal Foundation v. Andrus*, 657 F.2d 829, 836, (6th Cir. 1981), the Court of Appeals said as much when it dismissed the appellant's claim that an environmental impact statement under the National Environmental Policy Act, 42 U.S.C.A. §§ 4321 *et seq.* is required before a species is listed as endangered or threatened under the ESA:

> Appellants suggest that the impact statement would have indicated that several of the mussels had not been seen in years in the Duck River. Perhaps so, but the best scientific data on the existence and whereabouts of the species which the Secretary must consider under the ESA should already have indicated that fact. *If the Secretary has not relied upon the best data available, the solution would be judicial review of the rulemaking, not collateral attack to require an impact statement.*

term was intended to assure that species protection would be based upon credible scientific and commercial information:

> "The amendment will permit the wildlife agencies to frame their Section 7(b) opinions on the best evidence that is available or can be developed during consultation. If the biological opinion is rendered on the basis of inadequate information then the Federal agency has a continuing obligation to make a reasonable effort to develop that information." (H.R. Conf. Rep. No. 96-697, 96th Cong., 1st Sess. 12, *reprinted in* 1979 U.S.C.C.A.N. 2572, 2576)[24]

Thus, although incomplete information can form the basis of a biological opinion, mere speculation will not suffice. (*Greenpeace Action v. Franklin* 14 F.3d 1324, 1336 (9th Cir. 1992); *see, also, Babbitt v. Sweet Home Chapter of*

[24] Congressman Bowen, who co-sponsored the Endangered Species Act Amendments of 1979, made the following comment before the Committee of the Whole House on the State of the Union regarding the quality of information upon which the Secretary had *previously* relied:

> There have been problems [with the ESA]. We are all aware of them. The General Accounting Office has documented some serious management deficiencies. The failure to prioritize listing and recovery actions, inadequate attention to delisting or reclassifying species, *and the failure to utilize the best scientific data available*. I believe that the Department of the Interior has already made real progress in addressing these deficiencies. The amendments that I intend to offer to the bill will make sure that the Department does correct those portions of the program criticized by the GAO. (125 Cong. Rec. 29050 (1979) (Statement of Rep. Bowen)

Communities, supra, 515 U.S. __, 132 L.Ed.2d 597, 620 (O'Connor, J., concurring) (discussing the definition of "harm" and stating that "the regulation clearly rejects speculative or conjectural effects.")) As the Ninth Circuit itself previously held, incomplete information does not absolve the Secretary of the statutory requirement to prepare a comprehensive biological opinion. (*Connor v. Burford*, 848 F.2d 1441, 1454 (9th Cir. 1988). Moreover, a biological opinion must be "premised . . . on a reasonable evaluation of available data, *not on pure speculation*." (*Greenpeace*, supra at 1337 (emphasis added)) Thus, even though the best available information may be incomplete, a biological opinion that does not reasonably evaluate this information but, instead, simply draws a speculative conclusion, violates the Act.

(c) Congress Amended the ESA to Require Consideration of Economic Feasibility in the Development of Biological Opinions

In 1978, Congress amended the ESA by enacting the consultation procedures which resulted in the biological opinion at issue in this case.[25] More specifically, Congress amended the Act to require that "reasonable and prudent alternatives" be developed by the Secretary in the event a project, as proposed, is found to cause jeopardy to a listed

[25] Congress' purpose in doing so was to introduce flexibility into the Act. (See e.g., H.R. Rep. No 1625, 95th Cong., 2nd Sess., at 3 (1978); 124 Cong. Rec. 9804 (1978) (Statement of Sen. Baker); 124 Cong. Rec. 21,135 (1978) (Statement of Sen. Randolph); 124 Cong. Rec. 21,139 (1978) (Statement of Sen. Scott)).

species. (ESA § 7(b)(3)(A); 16 U.S.C. § 1536(b)(3(A)). While this requirement was added for the specific purpose of compelling the Secretary to consider economic feasibility, community impacts and other relevant factors in the course of developing biological opinions, the opinion developed for the Klamath Project provides no indication that *any* economic-based inquiry was undertaken when restrictions were imposed upon the release of irrigation water from Clear Lake and Gerber reservoirs.

Reference to the legislative history of the 1978 amendments of the ESA discloses that the phrase "reasonable and prudent alternatives" was defined during debate on S. 2899, 95th Cong., 2nd Sess. (1978), which contained the amendatory language ultimately adopted by Congress. During a colloquy concerning the meaning of the phrase "reasonable and prudent alternatives," Senator Howard Baker – without dissent – stated the following:

> "It is the intent of the Environment and Public Works Committee that the cabinet-level panel established by S. 2899 [the Endangered Species Committee] in evaluating alternatives examine not only engineering 'feasibility,' but also environmental and *community impacts, economic feasibility and other relevant factors*. In other words, the Environment and Public Works Committee believes that the use of the term 'reasonable' rather than 'feasible' gives more flexibility to the Endangered Species Committee in its review of 'irresolvable' conflicts arising under the Endangered Species Act." (124 Cong. Rec. 21,590 (1978))

Senator Baker's position as one of the chief sponsors of the so-called "Culver-Baker Amendments" which comprised S. 2899, is important. (*See, e.g., North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 526-527 (1982) ('remarks of the sponsor of language ultimately enacted are an authoritative guide to the statute's construction'); *Weinberger v. Rossi*, 456 U.S. 25, 35 (1982) (sponsor's statements entitled to weight))

Of at least equal significance is the fact that respondents, themselves, have interpreted the ESA to require that the "reasonable and prudent alternatives" which lie at the heart of any biological opinion that makes a jeopardy finding, must be "economically feasible." In Joint Regulations adopted by the United States Fish and Wildlife Service and the Marine Fisheries Service for the purpose of administering the ESA, the agencies define "reasonable and prudent alternatives" as follows:

> "*Reasonable and prudent alternatives* refer to alternative actions during formal consultation that can be implemented in a manner consistent with the intended purpose of the action, that can be implemented consistently within the scope of the federal agency's legal authority and jurisdiction, *that are economically* and technically *feasible*, and that the Director believes would avoid the likelihood of jeopardizing the continued existence of listed species or resulting in the destruction or adverse modification of critical habitat." (50 C.F.R. § 402.02, emphasis added)

In short, both Congress *and* the agencies charged with implementation of the ESA recognized that development of the kind of "reasonable and prudent alternative" which lies at the heart of the present case must be guided

by the concept of "economic feasibility." The Ninth Circuit's decision, however, denies standing to the only group of potential plaintiffs who could be relied upon to challenge agency disregard of the "economic feasibility" requirement.

(d) Congress Explicitly Required Federal Agencies to Cooperate With State and Local Agencies to Resolve Water Resources Issues in Concert With the Conservation of Endangered Species

Finally, in 1982, Congress amended Section 1 of the ESA to amplify its "Policy" regarding the conservation of endangered species. As amended, Section 1(c) of the Act (16 U.S.C. § 1531(c)) now provides, in relevant part:

> "(2) It is further declared to be the policy of Congress that federal agencies shall cooperate with state and local agencies to resolve water resource issues in concert [[26]] with conservation of endangered species."

Thus, with respect to the singular matter of "water resource issues," Congress granted state and local water resource agencies an interest in obtaining federal cooperation in resolving endangered species conservation issues

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[26] In *Jeffers v. United States*, 432 U.S. 137, 148-49 (1977), this Court defined the words "in concert" in the following terms:

> "In the absence of any indication from the legislative history or elsewhere to the contrary, the . . . likely explanation is that Congress intended the word 'concert' to have its common meaning of agreement in a design or plan."

agreeably with water resource management concerns. Such agencies – and appellants Horsefly Irrigation District and Langell Valley Irrigation District are each alleged to be a subdivision of the State of Oregon (App. to Pet., pp. 33-34) – have a unique interest that is protectable under the terms of the ESA itself.

IV. THE ALLEGATIONS OF PETITIONERS' COMPLAINT SATISFY THE IRREDUCIBLE MINIMUM STANDING ELEMENTS ESTABLISHED BY ARTICLE III OF THE CONSTITUTION

In their opposition to the Petition for Writ of Certiorari, respondents have asserted an Article III standing argument (Br. for Res. in Opp. to Pet., pp. 9-11) that is outside the scope of the issues raised in the Petition and that was never decided by either the District Court (see App. to Pet., p. 27) or the Ninth Circuit. Indeed, the Ninth Circuit did *not* perceive Article III standing to be the issue before it:

> "The issue before us is not whether the plaintiffs have satisfied the constitutional requirements but whether this action is precluded by the zone of interests test, the prudential standing limitation that the district court deemed dispositive." (63 Fd.3d 915, 917)

Considering the procedural context within which the present case reached the Ninth Circuit, the appellate court's focus upon prudential standing limitations, rather than Article III requirements, was appropriate. This litigation was disposed of at the pleading stage on a motion to dismiss. (App. to Pet., p. 28) In these circumstances, the burden of establishing Article III standing is a modest

one. (See *National Organization of Women v. Scheidler*, 510 U.S. ___, 127 L.Ed.2d 99, 107 (1994); *Lujan v. Defenders of Wildlife, supra*, 504 U.S. ___, 119 L.Ed.2d 351, 364; *Lujan v. National Wildlife Federation*, 497 U.S. 871, 889 (1990); *United States v. SCRAP*, 412 U.S. 669, 688-90 (1973) (extended chain of causation sufficient to show injury at pleading stage))

Here, the modest burden of demonstrating Article III standing is more than adequately carried. Petitioners allege injury to contract-based water entitlements resulting from reduced quantities of irrigation water otherwise available to them (App. to Pet. pp. 34, 40) thus raising far more than a generalized grievance common to all members of the public. (*Lujan v. Defenders of Wildlife, supra*, 504 U.S. ___, 119 L.Ed.2d 351, 372-375) They also allege that their injury is *caused* by the restrictions on lake levels found in respondents' biological opinion. (App. to Pet., pp. 34, 40) Further, redressability is satisfied because petitioners seek relief which will set aside the biological opinion and enjoin respondents from failing to comply with Sections 4 and 7 of the ESA (*id.* at 44), thus restoring them to the priority for Klamath Project water which they otherwise had under their contracts.

In the face of these allegations, respondents have resorted to the argument that petitioners' injury is not "fairly traceable to the challenged action;" but, instead, is the result of the "independent action of some third party not before the Court." (Br. in Opp. to Pet., p. 10) Reduced to the essentials, respondents' would have the Court pretend there is no connection between the biological opinion issued by the USFWS and re-operation of the Klamath Project by the Bureau – even though it was alleged that

the Bureau would comply with the precise terms of the biological opinion. (App. to Pet., p. 32) This suggested suspension of belief is grounded upon respondents' apparent assumption that the Bureau is free to ignore the reasonable and prudent alternatives suggested by the USFWS. (Br. in Opp. to Pet., p. 10) The assumption is fundamentally flawed, however, since it attempts to treat the biological opinion as a meaningless piece of paper and is incompatible with the ESA and its implementing regulations.

The basic, substantive obligation of federal agencies under the ESA is created by Section 7(a)(2) of the Act (16 U.S.C. § 1536(a)(2)) which provides in relevant part that each federal agency "shall" insure that any action it carries out is not likely to jeopardize the continued existence of any threatened or endangered species or result in the destruction or adverse modification of critical habitat. To this end, regulations adopted by the Secretary to implement the ESA require that once a biological opinion is issued, the Bureau must determine whether and in what manner to proceed in light of the opinion and to notify the FWS of its final decision regarding the proposed action. (50 C.F.R. § 402.15(b))[27]

While the Bureau (or the Secretary) may depart from a biological opinion, it may do so only if "alternative, reasonably adequate steps to insure the continued existence of any threatened or endangered species" are

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[27] 50 C.F.R. § 402.15(b) provides:

"If a jeopardy biological opinion is issued, the federal agency shall notify the Service of its final decision on the action."

adopted. (*Tribal Village of Akutan v. Hodel*, 869 F.2d 1185, 1193 (9th Cir. 1988)) Furthermore, if the Secretary (or Bureau) deviates from the biological opinion, he does so "subject to the risk that he has not satisfied the standard of Section 7(a)(2)." (*Tribal Village of Akutan v. Hodel, supra; Westlands Water Dist. v. U.S. Dept. of Interior*, 850 F.Supp. 1388, 1421 (E.D. Cal. 1994))

Considering the substantial civil and criminal penalties which Congress has provided for non-compliance with the take provisions of the Act (16 U.S.C. § 1540(a), (b)), deviation from a biological opinion is not simply a matter of bureaucratic whim. Where, as here, a biological opinion includes a statement authorizing the take of species incidental to the operation of the project (see Jt.App., pp. 92-96), the authorization – and related immunity from civil or criminal liability – is valid *only* if there is compliance with the reasonable and prudent alternatives and measures prescribed by the USFWS. (See 16 U.S.C. §§ 1536(b)(4), 1536(o)(2); 50 C.F.R. §§ 402.14(i)(1)(iv), 402.14(i)(5)) Hence, in order to avoid potential criminal liability for an illegal "take" of endangered species, the Bureau *had* to modify its operation of the Klamath Project to conform to the biological opinion. It is thus incorrect to suggest that the biological opinion had no discernible impact on Klamath Project operations and that the causation and redressability elements of Article III standing are lacking.

Moreover, as this Court also recognized in *Lujan v. Defenders of Wildlife, supra*, where the plaintiff himself is an object of the challenged action at issue, there is ordinarily little question that the action caused the injury and that a judgment preventing the action will redress it. (504

U.S. at 119 L.Ed.2d at 365) Here, the record shows that the regulation of irrigation releases from the reservoirs utilized by petitioners is a principal object of the biological opinion. *Inter alia*, the opinion states that irrigated agriculture has reduced the quantity and quality of habitat available for suckers (Jt.App., p. 38); that Gerber Reservoir reached critically low levels in the two years preceding the opinion because of releases of water for irrigation (*id.*, 56); and that irrigation releases in drought years will reduce reservoir surface area and hence cause a loss of habitat in Clear Lake Reservoir (*id.*, p. 68).

Perhaps not surprisingly in view of the foregoing determinations, the Reasonable and Prudent Alternative developed by the USFWS makes the reduction of "water deliveries" from the reservoirs one of its main objects. Thus, it prohibits "water deliveries" from Gerber Reservoir when surface elevations are 4799.6 feet or less. (Jt.App., p. 90) It also requires a minimum surface elevation in Clear Lake Reservoir of 4523.0 feet and bars "water deliveries" from the reservoir when surface elevations are 4521.0 feet or less. (*Id.*, pp. 88-89) In these circumstances, there is little question that, by virtue of their diversion and use of irrigation water from Clear Lake and Gerber reservoirs, petitioners are an object of the biological opinion at issue.

V. RESPONDENTS ENJOY NO IMMUNITY FROM COURT REVIEW IF THEY ISSUE A FLAWED BIOLOGICAL OPINION OR OVER-REGULATE IN THE NAME OF SPECIES PRESERVATION

Respondents have also argued they may issue a "flawed biological opinion" and over-regulate in the

name of species protection without the threat of court review. (Br. for Res. in Opp. to Pet., pp. 11-14) Not only does this assertion run counter to the presumed reviewability of administrative action repeatedly enunciated by this Court; it makes a mockery of Congress' intent to *encourage* the judicial review of ESA decisions by extending the use of the citizen suit to "any person."

In *Barlow v. Collins, supra,* 397 U.S. 136 the Court broadly expressed its view that the preclusion of judicial review of administrative action is not to be lightly inferred. (*Id.* at 166) Rather, judicial review of such action "is the rule," while nonreviewability is "an exception which must be demonstrated." (*Id.*; see also *Japan Whaling Association v. American Cetacean Society,* 478 U.S. 221, 230, n. 4 (1986); *Block v. Community Nutrition Institute,* 467 U.S. 340, 345 (1984); *Citizens to Preserve Overton Park v. Volpe,* 401 U.S. 402, 410 (1971))

Here, it can hardly be said that the Endangered Species Act evidences a legislative intention to preclude judicial review. To the contrary, the citizen suit provision of the Act forcefully expresses Congress' intentions with respect to judicial review when it authorizes the commencement of a civil suit by "any person" to enjoin the conduct of "any person, including the United States and any other governmental . . . agency" alleged to be in violation of "any provision" of the Act or regulation issued thereunder. (16 U.S.C. § 1540(g)(1)(A)) A clearer, broader authorization of judicial review would be difficult to create.

Moreover, the present case is not the first time respondents have advanced their argument that ESA

over-regulation is immune from review. Earlier this year the same argument was advanced in the case of *Mausolf v. Babbitt,* 913 F.Supp. 1334 (D. Minn. 1996). It provoked the following response from the district court:

> "The Court is unwilling to adopt the view that the FWS is unrestrained if it cloaks any of its acts in the laudable robe of endangered and threatened species protection. This is a form of totalitarian virtue – a concept for which no precedent has been advanced and which is foreign to the rule of law." (*Id.* at 1342)

Respondents' assertion of ESA immunity for virtuous over-regulation also runs counter to the observation in *Babbitt v. Sweet Home Chapter of Communities, supra,* 515 U.S. ___, 132 L.Ed.2d 597 that,

> "One can doubtless imagine questionable applications of the regulations [defining the word 'harm' used in § 3(19) of the ESA (16 U.S.C. § 1532(19))] that test the limits of the agency's authority." (515 U.S. ___, 132 L.Ed.2d 597, 621 (O'Connor, J., concurring))

The position that there are no limits to USFWS over-regulation under the ESA – so long as the over-regulation occurs in the name of species protection – is an unprecedented assertion of federal regulatory authority. It is also a concept, "foreign to the rule of law." (*Mausolf* at 1342) However, unless potential plaintiffs such as the petitioners are found to have standing to sue, it is unclear how the citizen suit provision of the ESA could ever be used to prevent over-regulation involving activities such as the designation of critical habitat without regard to economic impact; the issuance of biological opinions whose findings

and conclusions extend beyond available scientific data or the development of "reasonable and prudent alternatives" that ignore economic feasibility and community impacts. Indeed, if the Ninth Circuit was correct in holding that citizen suits are available *only* to those who allege an interest in species preservation, such suits are likely to result in skewed enforcement of the ESA which actually *encourages* governmental over-regulation.

VI. CONCLUSION

For the foregoing reasons, the Ninth Circuit erred when it determined that citizen suits under the Endangered Species Act are subject to a narrow zone of interest test. By authorizing "any person" to challenge government conduct alleged to violate the Act, Congress acted to expand standing to the full extent permitted by Article III. Moreover, if a zone of interest test applies notwithstanding the citizen suit language utilized by Congress, such a test was satisfied by the petitioners herein. Accordingly, for the reasons set forth above, the decision of the Ninth Circuit Court of Appeals should be reversed.

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Respectfully submitted,

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